Nos. 724 and 749

In the Supreme Court of the United States

OCTOBER TERM, 1956

STANISLAW NOWAK, PETITIONER

v.

UNITED STATES OF AMERICA

REBECCA MAISENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (M. R. 31a–33a; N. R. 52a–54a; N. Pet. App. 4a–6a) [1] is reported at 238 F. 2d 282. The opinion of the District Court in *Nowak* v. *United States*, No. 729 (N. R. 24a–35a) is reported at 133 F. Supp. 191.

[1] The designations "M." and "N." refer to *Maisenberg*, No. 749, and *Nowak*, No. 729, respectively.

The opinion of the District Court in *Maisenberg* v. *United States,* No. 749 (M. R. 26a–28a) is unreported.

JURISDICTION

The judgments of the Court of Appeals were entered on November 26, 1956 (M. R. 30a; N. R. 49a). The petition for a writ of certiorari in *Nowak* v. *United States,* No. 729, was filed on January 30, 1957, and in *Maisenberg* v. *United States,* No. 749, on February 4, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether knowingly false answers, at the time of naturalization in 1938, as to membership in an organization advocating the overthrow of the United States Government were sufficient grounds for denaturalization of petitioners.

2. Whether there was clear, unequivocal, and convincing evidence of fraud and concealment by petitioners of their membership in such an organization.

3. Whether an affidavit by an attorney of the Immigration and Naturalization Service, based upon a review of the Service's files, meets the "good cause affidavit" requirement under *United States* v. *Zucca,* 351 U. S. 91.

4. Whether the doctrine of *res adjudicata* applies to a denaturalization decree based on fraud and concealment of material facts.

5. Whether the orders denaturalizing petitioners violate the First and Fifth Amendments.

STATUTES AND REGULATION INVOLVED

The pertinent statutes and regulation provide as follows:

The Nationality Act of 1906, as amended;

Section 4, paragraph 4 (34 Stat. 596, as amended, 8 U. S. C. (1934 ed.) 382:

> No alien shall be admitted to citizenship unless (1) immediately preceding the date of his petition the alien has resided continuously within the United States for at least five years and within the county where the petitioner resided at the time of filing his petition for at least six months, (2) he has resided continuously within the United States from the date of his petition up to the time of his admission to citizenship, and (3) during all the periods referred to in this subdivision he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States. * * *

Section 7 (34 Stat. 598, 8 U. S. C. (1934 ed.) 364):

> No person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall

be naturalized or be made a citizen of the United States.

Section 15 (34 Stat. 601, as amended, 8 U. S. C. (1934 ed.) 405) (replaced in 1940 by Section 338 (a) of the Nationality Act of 1940):

It shall be the duty of the United States district attorneys for the respective districts, or the Commissioner of Immigration and Naturalization or Deputy Commissioner of Immigration and Naturalization, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. * * *

Section 338 (a) of the Nationality Act of 1940 (54 Stat. 1158, 8 U. S. C. (1940 ed.) 738 (a) (replaced by Section 340 of the Immigration and Nationality Act of 1952, 66 Stat. 260):

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such

order and certificate of naturalization were illegally procured.

Section 340, Immigration and Nationality Act of 1952 (66 Stat. 260; 8 U. S. C. 1451 (a)):

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *.

The Act of October 16, 1918 (40 Stat. 1012, as amended, 8 U. S. C. (1934 ed.) 137):

SECTION 1. That the following aliens shall be excluded from admission into the United States:

* * * * *

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law,* * *

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law; * * *.

Section 2. That any alien who, at any time after entering the United States, is found to have been at the time of entering, or to have become thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *.

Section 8 of the Act of March 2, 1929 (45 Stat. 1512), amending the Nationality Act of 1906, in part:

The Commissioner of Naturalization, with the approval of the Secretary of Labor, shall make such rules and regulations and such changes in the forms prescribed by section 27 of this Act as may be necessary to carry into effect the provisions of the naturalization laws.

Code of Federal Regulations (1938 ed.), Title 8, Section 70.7:

Wherever practicable, preliminary examinations of applicants for naturalization and their witnesses will be made in person. The princi-

pal purpose of such examinations is to obtain information bearing upon the applicant's admissibility to citizenship and the qualifications of the witnesses, rather than to obtain responses for record purposes. Both the applicant and the witnesses shall be carefully interrogated to determine whether the applicant has complied with the jurisdictional requirements of law, is mentally and morally qualified for citizenship, is attached to the principles of the Constitution, and is well disposed to the good order and happiness of the United States * * *.

STATEMENT

1. *No. 729, Stanislaw Nowak.*

Petitioner emigrated to the United States from Poland in 1913 and was admitted to United States citizenship by a decree entered by the United States District Court for the Eastern District of Michigan on June 13, 1938 (R. 2a, 3a). On December 23, 1952, the United States Attorney filed a complaint in the same court (pursuant to Section 338 (a) of the Nationality Act of 1940) alleging that such citizenship had been illegally and fraudulently procured and praying that the decree of naturalization be set aside (R. 2a–7a). The complaint and the amendment thereto alleged *inter alia* that, at the December 1937 preliminary hearing on his petition for naturalization, petitioner made a false and fraudulent representation to the naturalization examiner in that he testified under oath that he had never been a member of the Communist Party, that he fully believed in the government of the United States and did not belong to

any organization which advocated the overthrow of the existing government, whereas in fact he had been a member of the Communist Party from 1935 until 1938, and knew that the Party advocated the violent overthrow of the government of the United States. It was alleged that petitioner gave the false testimony and concealed the material facts to induce the Immigration and Naturalization Service to recommend the granting of the petition (R. 5a–6a, 13a–14a).

Attached to the complaint was an affidavit by an attorney of the Immigration and Naturalization Service, who stated that, from his examination of the records of the Service, it appeared that in the pre-naturalization proceedings petitioner had alleged that he was attached to the principles of the Constitution of the United States, that he did not belong to any organization which taught or advocated the overthrow of the existing government and that he was not and never had been a member of the Communist Party, but that petitioner's allegations were in fact false in that he had become an active member of the Communist Party in 1935 and continued such membership to the date of the complaint; and that petitioner and the Communist Party advocated the violent overthrow of the United States Government and circulated literature to that effect (R. 7a–12a).

At the trial, two naturalization examiners, who had questioned petitioner at the time his petition for naturalization was filed, testified that they inquired of petitioner whether he was or ever had been a member of the Communist Party, and that petitioner answered "No." The witnesses did not make any

notations on the petition as to his membership in the Party but testified that they remembered having asked that question because they had heard, previous to the examination, that petitioner, who had gained notoriety in encouraging strikes, was a Communist (R. 23a, 26a). The examiners did note on the petition that petitioner approved of sitdown strikes as being necessary to enforce the strikers' demands and that he was arrested once for encouraging such strikers to "hold the fort" (R. 23a).

In his Preliminary Form A-2214 for a Petition for Naturalization, which was introduced in evidence at the trial, petitioner had answered "No" to question 28 which read "Do you belong to or are you associated with any organizaion which teaches or advocates anarchy or the overthrow of existing government in this country" (R. 18a-19a).

Unimpeached and uncontradicted testimony of witnesses acquainted with petitioner's Communist Party membership, as found by the District Court, may be summarized as follows (R. 28a-29a):

> Witness Budenz—Attended closed Communist Party meetings with Nowak from late 1937 until 1943 or 1944; knew Nowak to be a Communist Party member for these years; attended enlarged National Committee meetings of Communist Party with Nowak, one in 1938 and two in the forties.
>
> Witness Fountain—Attended closed Communist Party meetings in Detroit with Nowak from June 1937 through 1938; knew Nowak to be a Communist Party member; attended Communist Party schools where Nowak lec-

tured on "Strategy of the Communist Party in relation to labor, and rise of Hitler."

Witness Eager—Nowak solicited Eager's membership in Communist Party in 1937; knew Nowak was a Communist Party member and attended many closed Communist Party meetings from 1937 through 1938.

Witness Nowell—Knew Nowak was a member; he solicited Nowak's membership; was present at his induction; attended closed Communist Party meetings from 1935 through 1936 with Nowak.

Witness Hewitt—Knew Nowak to be a member of the Communist Party in 1938; collected Communist Party dues from Nowak in 1938 and 1939; attended closed Communist Party meetings with Nowak.

Witness Reno—Knew Nowak to be a Communist Party member from July or August 1937 to December 1938; attended functionary meetings with Nowak; closed Communist Party meetings and an enlarged National Committee meeting in December 1938 with Nowak; also saw his Communist Party card.

Witness Rataj—Attended one closed Communist Party meeting with Nowak in fall of 1937.

Witness Herbster—Attended one closed Communist Party meeting with Nowak in summer of 1937.

The following evidence was also adduced at the trial:

Nowell and Baxter testified that they attended the Lenin Institute in Moscow and were taught that the Communist Party in the United States aimed to over-

throw the United States Government by force and violence and that they later taught in Communist Party schools and meetings that such was the aim of the United States Communist Party. They said that they were also taught the science of civil warfare for the purpose of destroying the United States Government and establishing a proletarian dictatorship and that the Party in the United States was bound by the decisions of the Communist International (N. Pet. 12–13). Nowell further testified that he successfully solicited petitioner's membership to the Party and that at the time petitioner made a brief analysis of capitalism and the conditions under which the Party operated. He pledged his allegiance to the Party and expressed his full agreement with the theories and the leadership. Nowell testified: "* * * I quote as nearly as possible—he stated that the working class could never achieve its objectives or get its rights under capitalism, that it would be necessary to destroy—I am reasonably sure of the word 'destroy'—capitalism and set up a government of the workers" (N. Pet. 13, 38).

Fountain testified that petitioner told him that the goal of the Party's activities was to extend the Soviet system around the face of the earth and to achieve that end "you try to win control of your union for the Communist Party; you agitate an election, you work by trying to win elections and get people elected to office, Communists and otherwise, and that this is to be carried on year in and year out, seeking control for the Communist Party." And if "[y]ou can't get it that way then it may be necessary to use violence

to get it, to win control for the Communist Party and the Communist system" (N. Pet. 38–39).

Eager testified that petitioner said "we couldn't depend too much on the ballot to gain our objectives but that it would eventually resolve to bullets, and it was only by the same militancy of the workers in the plants that we, as leaders, would be able to establish a Soviet America" (N. Pet. 37).[2]

The District Court said that it made no finding as to whether the naturalization examiners asked petitioner about his Communist Party membership since, due to the lapse of time and lack of any notation on the petition relating to the question, it felt that it was unlikely that the examiners actually remembered questioning petitioner as they testified and, hence, that their testimony was not "clear, unequivocal and convincing" on this issue (R. 26a–27a). But it found that petitioner was a member of the Communist Party of the United States from 1935 to at least through 1938 and probably up to the present time, that he knew that its main objective was the violent overthrow of the United States Government and approved of that goal, and that he intended to and did conceal such membership when he signed his petition for naturalization and answered question 28 on that subject in the negative (R. 27a). Accordingly, the District Court entered a judgment setting aside the 1938 decree which had made petitioner a citizen (R. 35a–36a).

[2] The government also introduced in evidence some of the literature distributed by the Party, including Marx's and Engels' *Communist Manifesto*, writings by Stalin, and Lenin's *State and Revolution* (N. Pet. 11–12).

The Court of Appeals affirmed (R. 49a; N. Pet. App. 6a).

2. *No. 749, Rebecca Maisenberg.*

Petitioner was born in Russia in 1901 and arrived in the United States in 1912 (R. 1a, 22a). She was admitted to United States citizenship in the United States District Court for the Eastern District of Michigan on January 24, 1938 (R. 2a). In March 1953, in the same court, pursuant to the Immigration and Nationality Act of 1952, the United States Attorney filed a complaint which alleged that her citizenship was obtained by concealment of material facts and by willful misrepresentation, in that in her Preliminary Form A–2214 for a Petition for Naturalization (R. 22a–24a) she answered "No" to a question which read "Do you belong to or are associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country." The complaint alleged that from 1930 until the date of her naturalization she was a member of the Communist Party, and that to her knowledge the Party during the years of her membership prior to her naturalization, 1930–1938, advocated the violent overthrow of the United States Government (R. 2a–8a). Attached to the complaint was an affidavit by an attorney of the Immigration and Naturalization Service, based upon a review of petitioner's Service file, which was similar to the one filed in *Nowak*, except it did not state that petitioner was specifically asked about membership in the Communist Party (R. 8a–12a).

At the trial, it was stipulated that certain witnesses would testify that from 1929 to 1950 the Communist Party advocated the violent overthrow of the United States Government and disributed revolutionary literature (R. 18a–21a).

Witness Nowell, a former member of the Communist Party of the United States, testified that he assisted in recruiting petitioner into the Party in 1930 and he remembered "more or less specifically" telling her at that time that the objective of the Party she was joining was the overthrow of the government of the United States by force and violence. She replied that she agreed with that policy (Pet. App. 1a, 3a–4a). Although Nowell did not always specifically advise all new members of this ultimate objective, he advised petitioner because "she had a good understanding of the program" and "had been a sympathizer for a long time" previous to joining (Pet. App. 5a). During his membership in the Party, Nowell was taught that the Communist Party of the United States was part of the "parent" organization, the Communist International, whose decisions were binding upon each member of the Party. While a member, petitioner was a Section Organizer and as such responsible for effecting the policies of the District Bureau. Her duties consisted of transmitting the decisions of the District Bureau to the Section membership and implementing them, directing the Party membership in the Section through the Section Bureau and the unit organizers and serving as "the physical and political contact between the District Committee and the Bureau and the Section

Committee of that Section" (Pet. App. 1a). During Nowell's membership in the Party from 1930 through 1936, he discussed the aims of the Communist Party with petitioner frequently and found that she adhered to the principles and objectives of the Communist Party (Pet. App. 2a). In her capacity as Section Organizer, she gave reports on decisions and policies of the District Bureau and the Central Committee. It was also her duty to explain the political theories to the members (Pet. App. 2a). In discussing the aims of the Party to its members, following the abolition of the "T. U. L." (sic, probably the Trade Union Unity League) and preparatory to the Seventh National Congress of the Communist International either in 1934 or 1935, she said that the essential line of the Party including "the overthrow of the system and government and the establishment of a Soviet America had not changed" (Pet. App. 6a–7a). The petitioner also attended several hundred meetings during Nowell's membership, at some of which the objective of the Communist Party of overthrowing the existing United States Government was discussed (Pet. App. 7a, 9a).

Witness Reno, who had been Organization Secretary for the Michigan District of the Communist Party from 1931–1934 and 1937–1938, testified that petitioner was a Section Organizer in Detroit and a member of the District Committee from 1933 through 1938. He "guessed" that he attended "probably" more than 200 closed Party meetings with petitioner (Pet. App. 10a). In his official capacity, he held dis-

cussions with the Section Organizers individually and as a group. These discussions related to membership, dues, Party policies and "usually—in fact nearly always" the distribution of Party literature. Reno did not remember his specific discussions with petitioner, but he remembered definitely that he talked with her individually on the subjects enumerated above (Pet. App. 10a–12a).

Witness Stewart, who was a member of the Communist Party from 1931 to 1937, testified that in December 1931 he and petitioner attended the Communist Workers School near Detroit. The books used in the school were the *Communist Manifesto,* Lenin's *State and Revolution,* and other books by Engels and Marx (Pet. App. 13a). At the school they were taught that the ultimate aim of the Party was the establishment of a proletarian government in the United States by the violent overthrow of the existing government and that only the Communist Party would succeed at such a revolution. They were taught that discussions sharpening the class struggle, support of strikes and demonstrations of workers were all means to effectuate the ultimate objective. They were instructed not to cooperate with the courts or the police. The school teachings included a study of Communist Parties all over the world, with particular emphasis on the Party in Russia and on the successful revolution in Russia and how it was achieved, with a view to improving the Communist Party of the United States and teaching its members how to bring about such a revolution here (Pet. App. 13a–20a, 27a–28a). They were also taught that the Communist Interna-

tional taught revolution by violence (Pet. App. 27a). In working with Stewart, petitioner encouraged him to recruit members because she said it was necessary to increase the membership so that a successful revolution could be achieved (Pet. App. 20a–24a). She also encouraged the distribution of literature to "get the people to read the literature" and thereby eventually cause the revolution (Pet. App. 25a). Stewart further testified that he understood, as all Communists did, that the main aim of the Communist Party was the overthrow of the existing United States Government (Pet. App. 26a–27a).

Witness Baldwin, a member of the Communist Party for the F. B. I. from 1943–1952, saw petitioner at various meetings in 1944 and at the State Convention in 1944. In 1944 petitioner was Club Chairman of the West Side Club; later she became Literature Director of the Communist Party Book Store for District Seven of Detroit, Michigan, and she was on the State Board of the Communist Party. As Literature Director it was her responsibility to see that all of the Marxist-Leninist and Engels books, and other revolutionary books and periodicals, were distributed to the Party members. This witness said that the Literature Department was the "mainstay" of the Party since it was through educational work that people would be educated in the revolutionary movement (Pet. App. 29a–30a).

Witness Syrakis, Secretary of the Greek Political Bureau, Communist Party of the United States, testified that he first met petitioner at a general meeting of the Party at which Earl Browder spoke. At that

meeting petitioner sat with the Party's functionaries. At closed meetings of the Party, Syrakis heard petitioner say that it was important for Party members to run for public office to show their strength because that show of strength would be important in the eventual revolution. At a Party school meeting, petitioner said that the Party should utilize its strength among the working class "so when the time comes we will have them as our allies for the ultimate aim" (Pet. App. 31a–34a, 36a–37a).

Witness Elder, who became a member of the Party in 1936, testified that he attended about four closed meetings of the Communist Party through 1942, which petitioner also attended. At one of the meetings in 1936, the speaker at the meeting said that in view of the then current sitdown strikes the time was ripe to recruit workers and to distribute Communist literature including the "Daily Worker" (Pet. App. 37a–40a).

The District Court found that petitioner "did conceal (a) the fact that she was a member of the Communist Party when she filed her petition and when she obtained her citizenship; (b) that she was aware that the Communist Party, to which she belonged, was an organization having as an objective the overthrow of this government by force and violence;" and that she "was not a person of good moral character and attached to the principles of the United States Constitution." It prefaced its opinion with the statement that "the proof [in this case] is similar to that found in the case of *United States* v. *Nowak*, decided July 15, 1955, by this court * * *", and made no ad-

ditional findings (R. 26a–28a). It entered a judgment setting aside the 1938 decree which had made petitioner a citizen (R. 28a–29a). The Court of Appeals affirmed (R. 30a; N. Pet. App. 6a).

ARGUMENT

Each petitioner contends that the evidence is insufficient, under the standard of "clear, unequivocal and convincing evidence",[3] to establish the falsity of his statement in the naturalization proceedings (in answer to a question) that he had never been a member of an organization which advocated the overthrow of the existing government of the United States. Neither makes any challenge to the evidence which established, not merely membership in the Communist Party, but also active participation as a fairly high-level functionary in the work of the Communist Party at the time of naturalization. The gist of the argument in both petitions is that the courts below were not justified in finding, as they did, that these active functionaries knew that the Communist Party advocated the violent overthrow of the government and willfully concealed that fact. There is no merit to this contention or in petitioners' other grounds for review.

1. At the outset, it should be pointed out that arguments based on the fact that the word "violence" did not appear in question 28 (which asked whether the applicant for naturalization was a member of an organization which advocated the overthrow of exist-

[3] *Schneiderman* v. *United States*, 320 U. S. 118, 158, and *Baumgartner* v. *United States*, 322 U. S. 665.

ing government) serve to detract from, rather than support, petitioners' contention that fraud and concealment were not established by their negative responses to that query. Whatever little room for dispute there may be as to whether petitioners knew that the Communist Party advocated the violent overthrow of the government (see *infra*, pp. 22–25), there can be none at all that they knew that the Party advocated the overthrow of the existing government. Hence, there can be no doubt that their answers to question 28 were knowingly and willfully false.

Even in the absence of proof of knowledge of the Party's advocacy of violence, that false answer could not be deemed immaterial to the naturalization proceeding. The question involved here is not the validity of a naturalization certificate issued on the basis of known facts as to Party membership. The significant point is that the naturalization court was prevented from making an adjudication on the true facts because of petitioners' concealment and misrepresentation. If petitioners had answered question 28 accurately, the true situation could have been explored at the time. A truthful answer would have permitted inquiry into the nature of petitioners' advocacy of the overthrow of the existing government.

And there can be no doubt that, at the time of petitioners' naturalization, a finding of advocacy of violent overthrow—the finding that was made in these cases by the trial court, whether required or not—would have justified denial of naturalization. For, at the time of their naturalization, petitioners would have been subject to deportation under the express provi-

sion of Section 2 of the Act of October 16, 1918, *supra,* pp. 5–6, which required deportation of aliens who were members of an organization which advocated, or which distributed literature advocating, overthrow of the government by force and violence. Those provisions governing deportation must be considered a part of the statutory criteria for citizenship since it can hardly be supposed, as petitioners urge (N. Pet. 27; M. Pet. 15), that Congress intended that citizenship be granted to aliens who at the same time were disqualified from continued residence because of their political affiliations. Cf. *United States* v. *Thind,* 261 U. S. 204, 215. Thus, the fact that the 1906 Act did not specifically refer to advocacy of violent overthrow as a bar to naturalization did not prevent the Immigration and Naturalization Service from questioning applicants on that issue. Moreover, Section 70.7 of the Naturalization Regulations *supra,* pp. 6–7 promulgated under the 1929 Act, which amended the 1906 Act, directed the careful examination of applicants to determine if they were morally qualified for citizenship and attached to the principles of the Constitution. Questions as to advocacy of the violent overthrow of the United States Government were appropriate in a naturalization proceeding to determine petitioners' qualifications for citizenship on such grounds. Cf. *Genovese* v. *United States,* 133 F. Supp. 820 (D. N. J.), affirmed, 236 F. 2d 757 (C. A. 3), certiorari denied, 352 U. S. 952, and *Corrado* v. *United States,* 227 F. 2d 780 (C. A. 6), certiorari denied, 351 U. S. 925, where although arrests were not specifically mentioned in the law as a basis for

denial of citizenship, a false statement relative to arrests was held a proper basis for denaturalization.

For these reasons, we think the dispositive issue was whether petitioners were guilty of willful concealment when they answered question 28. Even in the light of their own interpretation of that question, the fraud in their answer is clearly and unequivocally established.

2. The District Court interpreted question 28 more favorably to petitioners than they do themselves, and possibly more favorably than was required. Perhaps on the basis that the word "overthrow" in that question carried the connotation of violence, the judge found, as he evidently thought he had to find, that petitioners, at the time they answered the inquiry, knew that the Communist Party advocated the overthrow of the government by violence. That finding is amply supported by the evidence.

(*a*) The sufficiency of the evidence to support the finding that, in the relevant period (1930–1938), the Communist Party did advocate the overthrow of the government by force and violence presents no problem for review in this Court. The sufficiency of similar findings on similar evidence has been too often upheld to require consideration at this time. *United States ex rel. Harisiades* v. *Shaughnessy,* 187 F. 2d 137 (C. A. 2), affirmed, 342 U. S. 580, relating to the 1930's. See *In re Saderquist,* 11 F. Supp. 525 (D. Me.), affirmed, 83 F. 2d 890 (C. A. 1). Petitioners' reliance on *Schneiderman* v. *United States,* 320 U. S. 118, as being to the contrary, is misplaced. In that

case, where naturalization had occurred in 1927, the issue was the applicant's personal attachment to the principles of the Constitution at the time of his naturalization—thus placing in issue the applicant's own understanding of Communist doctrine. In that context, this Court held that the evidence in the record as to the Communist Party's advocacy of the use of force and violence was not sufficient to meet the required proof (for purposes of denaturalization) of Schneiderman's own state of mind, but the Court specifically refused to determine the factual issue of the Party's advocacy of force. 320 U. S. at p. 158.

(*b*). Likewise without merit is the challenge (M. Pet. 15–16; N. Pet. 33–42) to the sufficiency of the evidence to support the finding that each petitioner knew that the Communist Party (during the period of their membership and at the time of naturalization) advocated the violent overthrow of the government. There is in each case direct and undisputed evidence that each was taught that the violent overthrow of the government was the ultimate objective of the Communist Party and that each embraced that doctrine.

(i) As to petitioner Maisenberg, the evidence summarized in the Statement, *supra,* pp. 13–18, shows that she, an active and militant worker in the Party, was not only informed of the revolutionary aims of the Party, but that she consistently advocated that objective and suggested the means to achieve it. There was no attempt to impute to her one of two possible theoretical positions, as the Court found was done in

Schneiderman. In her case, the record established her personal advocacy of militant revolution.

(ii) The record also supports the finding that petitioner Nowak knew and embraced the aim of the Communist Party to achieve the violent overthrow of the government. This would be a reasonable enough inference from his importance in the Party hierarchy and the care which was taken to keep his membership secret but there is also, as with Maisenberg, the evidence summarized in the Statement, *supra,* pp. 9–12, which shows his advocacy of the Party's objective and the means to achieve it.

(*c*) Moreover, despite the refusal of the trial court to base its finding thereon,* we think that Nowak's denaturalization is supported by the evidence that he was asked and falsely answered a direct question as to his membership in the Communist Party. See the Statement, *supra,* pp. 8–9. This Court is not bound by the findings of the trial court in denaturalization cases. *Baumgartner* v. *United States,* 322 U. S. 665, 670–671; see also *Genovese* v. *United States, supra; Cufari* v. *United States,* 217 F. 2d 404, 408–409 (C. A. 1). The record here is that the two naturalization examiners testified that they specifically questioned Nowak at the time that he filed his petition for naturalization as to whether he had ever been a member of the Communist Party, and that he answered "No".

* As shown in the Statement, *supra,* p. 12, the court based its decree of denaturalization on the falsity of petitioner's answer to question 28 in his petition for naturalization.

They explained their recollection of his case, as distinguished from many others, by his notoriety and by the rumor that he was a Communist. This is clear, unequivocal, and convincing evidence that this petitioner knowingly and falsely denied membership in the Communist Party. That alone would support his denaturalization. *Sweet* v. *United States,* 211 F. 2d 118 (C. A. 6), certiorari denied, 348 U. S. 817.

3. Petitioners challenge (N. Pet. 19–24; M. Pet. 10) the affidavits of good cause attached to the denaturalization complaints as insufficient because they were based on a review of the files of the Immigration and Naturalization Service and were not founded upon personal knowledge. This contention is said to be based upon the Court's ruling in *United States* v. *Zucca,* 351 U. S. 91. But there the Court decided only that an affidavit showing good cause was a procedural prerequisite to maintenance of a denaturalization proceeding. The sufficiency of the affidavit was not involved since no such affidavit had been filed. The only description in the majority opinion of the type of affidavit required was the general language (*id.* at p. 99) that while the complaint states ultimate facts "the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship." This does not seem to us to mean that the evidentiary facts may not be stated upon information and belief where the basis of such information and belief is set forth.

Petitioners' reliance on the cases under the Fourth Amendment, which declares that "no warrants shall

issue, but upon probable cause, supported by oath", is misplaced. This Court defined probable cause in *Brinegar* v. *United States,* 338 U. S. 160, 175, 176, as follows: "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." It rejected the earlier dictum of *Grau* v. *United States,* 287 U. S. 124, 128, to the effect that the facts must be evidence which is competent to convict and said, 338 U. S. at p. 175:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

While the Court in the *Brinegar* case was dealing with probable cause to search without a warrant, its discussion of *Grau* and other decisions relating to search warrants (338 U. S. at pp. 174–176, particularly fns. 13 and 15) shows that the "probable cause" definition there laid down was intended to apply generally to all searches. Its ruling has so been interpreted in *Washington* v. *United States,* 202 F. 2d 214 (C. A. D. C.), certiorari denied, 345 U. S. 956, and *Hawkins* v. *United States,* 238 F. 2d 265 (C. A. D. C.), petition for a writ of certiorari pending, No. 538 Misc., this Term.

Similarly, criminal proceedings can be initiated, and usually are, on indictments or information which are not based on personal knowledge. *Costello* v. *United States,* 350 U. S. 359. If criminal proceedings can be initiated and search and arrest warrants can be issued on information and belief, rather than on personal knowledge, *a fortiori* an affidavit of good cause based on information rather than personal belief should be adequate to initiate a denaturalization suit. For what is involved here is merely the initiation of denaturalization proceedings, and that would not seem to be on a higher plane than the deprivation of property and personal rights involved in the execution of arrest and search warrants and the initiation of criminal proceedings.

The purpose behind the Court's requirement of a good cause affidavit is to provide a safeguard against the consequences—such as damage to reputation and standing in the community—of denaturalization proceedings brought without a preliminary showing of good cause. *United States* v. *Zucca, supra,* at pp. 99–100. Affidavits such as those involved here, based on a review of the Immigration and Naturalization Service's files, protect naturalized aliens against irresponsible denaturalization proceedings and thus meet the reason for the good cause affidavit requirement. See also *United States* v. *Costello,* decided May 21, 1956, unreported (S. D. N. Y.), Civil No. 79–309;[5] *United States* v. *Chandler,* decided June 27, 1956, 142 F.

[5] A copy of this decision appears at the end of the *Nowak* record.

Supp. 557 (D. Md.), where affidavits based on information from government files were held sufficient under *Zucca*.

The question of whether the affidavit is a "jurisdictional" requirement (N. Pet. 19–20; M. Pet. 10) in a denaturalization proceeding is not really presented here since affidavits were filed when the actions were initiated and their sufficiency was challenged in petitioners' answers to the complaints. The decision in *United States* v. *Diamond*, (S. D. Cal.), decided July 26, 1956, appeal pending (cited by petitioner Maisenberg (Pet. 10, fn. 7))—that such an affidavit is jurisdictional—was made, as is apparent from petitioner's own summary of the case, in a case in which no affidavit at all was filed with the complaint.

4. Petitioners also urge (N. Pet. 42–46; M. Pet. 17) that the doctrine of *res judicata* applies here in that the issues of petitioners' good moral character and attachment to the United States Constitution were conclusively adjudicated in the naturalization proceedings in 1938.

But where findings of fraud and misrepresentation are fully supported, as in *Knauer* v. *United States*, 328 U. S. 654, petitioners agree (N. Pet. 44; M. Pet. 17) that there is no occasion to reach the issue as to whether naturalization decrees are subject to cancellation for illegality on the ground the applicants were not in fact persons of good moral character during the years preceding naturalization and not in fact attached to the principles of the Constitution (133 F. Supp. 191, 195; M. R. 26a). The same situation exists in the present cases. Because of petitioners' conceal-

ment of their Party membership, the facts on which rest the present findings that they were not persons of good moral character and lacked attachment to the United States Constitution were not before, and could not be determined by the naturalization court. The issue of denaturalization power *in the absence of fraud* is therefore not presented.[6]

5. Equally without merit are the constitutional arguments advanced by petitioners (N. Pet. 46–49; M. Pet. 17–18)—that their orders of denaturalization violated the First and Fifth Amendments because they proscribe the advocacy of overthrow of the United States Government. The judgments do not invade rights protected by the First and Fifth Amendments but merely withdraw the privilege of citizenship which is revocable because it was granted through fraud and misrepresentation. Congress certainly could refuse citizenship to aliens who advocate the violent overthrow of the Government (see *Dennis* v. *United States,* 341 U. S. 494; *Harisiades* v. *Shaughnessy,* 342 U. S. 580; *American Communications Association* v. *Douds,* 339 U. S. 382; *Carlson* v. *Landon,* 342 U. S. 524), and therefore it can validly provide for withdrawal of that privilege from aliens who obtained it by fraudulent concealment of such advocacy. "An

[6] It may be noted that in *United States* v. *Ness*, 245 U. S. 319, this Court held that a certificate of naturalization could be set aside as illegally entered, even though the government had entered an appearance and raised the very objection later presented as grounds for denaturalization. It was held that Sections 11 and 15 of the Act of June 29, 1906 (34 Stat. 596), *supra*, p. 4, "were designed to afford cumulative protection against fraudulent or illegal naturalization" (245 U. S. at 327).

alien has no moral nor constitutional right to retain the privileges of citizenship" obtained by false evidence. *Johannessen* v. *United States*, 225 U. S. 227, 241; see also *Bindczyck* v. *Finucane*, 342 U. S. 76.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

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